CHIA MENG LENG

v.

PP

COURT OF APPEAL, PUTRAJAYA
HISHAMUDIN MOHD YUNUS JCA
AZAHAR MOHAMED JCA
ALIZATUL KHAIR JCA
[CRIMINAL APPEAL NO: J-05-143-2010]
8 MARCH 2013

CRIMINAL PROCEDURE: *Trial - Impeachment - Facts of two cases closely inter-related - Whether impeachment of witness' testimony in other case could be relied upon in present case - Whether findings in earlier case undermined credibility of witness in present case - Whether prejudicial evidence in earlier case could be imported to present case to make adverse findings against accused*

CRIMINAL PROCEDURE: *Trial - Joint trial - Facts of two cases closely inter-related - Whether ought to have been tried together*

EVIDENCE: *Admissibility of evidence - Opinion and belief - Offence of drug trafficking - Frightful expression of accused - Whether evidence relevant - Whether matter of perception - Whether failure to substantiate evidence rendered evidence inadmissible*

Acting on an information received, ASP Leong Ah Kow ('PW2'), who was the main witness in the present drug trafficking case, led a police team to the scene of the alleged offence. Subsequently, PW2 and his team blocked two cars and upon search of the car driven by the appellant, a canvas bag containing packages of drugs was found at the foot well of the front passenger seat. Thereafter, the appellant was charged with an offence of trafficking in 785g of monoacetylmorphines, an offence punishable under s. 39B(2) of the Dangerous Drugs Act 1952. The appellant's defence was that he had rented the car for the use of one Chong Mei Fong. The appellant asserted that he did not have the exclusive use of the car since Chong Mei Fong had also used it and Chong Mei Fong could have concealed the drugs in the car. The appellant was convicted and sentenced to mandatory death. Hence, the present appeal. It was submitted for the appellant that the learned trial judge had erred in law in accepting the evidence of PW2 at face value and brought to the attention of the court, another case, the facts of which were closely inter-related to the facts of the instant

A case, involving the same appellant charged together with another person. The appellant and the other accused were, however, acquitted at the conclusion of the case for the prosecution. The defence, in the present appeal, tendered the notes of proceedings of the other case as evidence to show that PW2 was not credible
B as his evidence in the other case had been successfully impeached. The defence also submitted that the learned trial judge made adverse findings against the appellant from certain portions of the notes of proceedings of the other case to the prejudice of the appellant. The learned trial judge had also given weight to the
C evidence of PW2 in making a finding of guilt of the appellant.

Held (allowing appeal; setting aside conviction and sentence) Per Hishamudin Yunus JCA delivering the judgment of the court:

D **(1)** The instant case and the other case, in which the appellant was acquitted, should have been tried together and not separately by two different judges. In view of the successful impeachment of the testimony of PW2 in the other case, and the finding of the learned trial judge in that case that PW2
E was not a credible witness, the findings had seriously undermined PW2's credibility in the instant case. It was obvious from the grounds of judgment that the trial judge had failed to give due weight to PW2's impeachment in the other
F trial. (para 3)

(2) It was wrong in law to import prejudicial evidence from the notes of evidence of the other trial to make a finding in the present case that is detrimental to the appellant. Instead of using the notes of proceedings from the other case as
G supporting the defence case regarding the credibility of PW2, the learned trial judge proceeded to make use of the notes of evidence to make adverse findings against the appellant. This was a serious error that warranted appellate intervention. Other than for the purpose of challenging the credibility of
H PW2, the evidence of the other trial was irrelevant and inadmissible for the purpose of the present trial. (para 3)

(3) In making a finding of guilt, the learned trial judge had given weight to the evidence of PW2 on the frightful expression of
I the appellant on his face at the time when he opened the door of the appellant's car. The evidence of this nature was irrelevant as it was so subjective and more a matter of

perception. Unless substantiated, it could not be said to be an evidence of a fact. However, in the instant case, PW2 did not provide any detailed evidence to substantiate his assertion. Hence the learned trial judge should have ruled the evidence inadmissible. (para 3(e))

Bahasa Malaysia *Translation Of Headnotes*

Bertindak atas maklumat yang diterima, ASP Leong Ah Kow ('PW2'), yang merupakan saksi utama dalam kes pengedaran dadah ini, telah mengetuai suatu pasukan polis ke tempat kejadian bagi kesalahan yang didakwa. Kemudian, PW2 dan pasukannya menahan dua buah kereta dan selepas pemeriksaan di dalam kereta yang dipandu oleh perayu, sebuah beg kanvas yang mengandungi bungkusan dadah ditemui di bahagian meletakkan kaki penumpang hadapan. Perayu seterusnya dituduh dengan kesalahan mengedar 785g monoacetylmorphines, satu kesalahan yang boleh dihukum di bawah s. 39B(2) Akta Dadah Berbahaya 1952. Pembelaan perayu adalah bahawa dia telah menyewa kereta tersebut untuk digunakan oleh seorang yang bernama Chong Mei Fong. Perayu menyatakan bahawa dia tidak mempunyai penggunaan eksklusif kereta tersebut kerana Chong Mei Fong juga telah menggunakannya dan Chong Mei Fong mungkin telah menyembunyikan dadah di dalam kereta tersebut. Perayu disabitkan dan dijatuhkan hukuman mati mandatori. Maka, rayuan ini. Adalah dihujahkan bagi pihak perayu bahawa hakim bicara telah terkhilaf dari segi undang-undang dalam menerima keterangan PW2 secara zahir dan membawa kepada pengetahuan mahkamah, satu lagi kes ('kes tersebut'), yang mana faktanya berkait rapat dengan dengan fakta dalam kes ini, melibatkan perayu yang sama dituduh dengan seorang yang lain. Perayu dan seorang lagi tertuduh, walau bagaimanapun, telah dilepaskan di akhir kes pihak pendakwaan dalam kes tersebut. Pihak pembelaan dalam rayuan ini, mengemukakan nota prosiding dalam kes tersebut sebagai keterangan untuk menunjukkan bahawa PW2 tidak kredibel kerana keterangannya dalam kes tersebut telah berjaya dicabar. Pihak pembelaan juga menghujahkan bahawa yang arif hakim bicara membuat dapatan bertentangan terhadap perayu daripada bahagian tertentu nota prosiding kes tersebut sehingga menjejaskan perayu. Yang arif hakim bicara juga telah memberikan penekanan kepada keterangan PW2 dalam membuat dapatan terhadap kebersalahan perayu.

Diputuskan (membenarkan rayuan; mengenepikan sabitan dan hukuman)
Oleh Hishamudin Yunus HMR menyampaikan penghakiman mahkamah:

(1) Kes ini dan kes tersebut, di mana perayu telah dilepaskan, sepatutnya dibicarakan bersama-sama dan bukan secara berasingan oleh dua hakim yang berlainan. Disebabkan oleh cabaran yang telah berjaya bagi keterangan PW2 dalam kes tersebut, dan dapatan oleh yang arif hakim bicara dalam kes tersebut bahawa PW2 bukanlah saksi yang kredibel, dapatan tersebut telah secara serius menjejaskan kebolehpercayaan PW2 dalam kes ini. Adalah jelas daripada alasan penghakiman bahawa hakim bicara telah gagal memberikan penekanan yang wajar kepada cabaran terhadap PW2 dalam kes tersebut.

(2) Adalah salah dari segi undang-undang untuk memasukkan keterangan bertentangan daripada nota prosiding kes tersebut untuk membuat dapatan dalam kes semasa yang menjejaskan kepada perayu. Daripada menggunakan nota prosiding kes tersebut sebagai menyokong kes pihak pembelaan berkaitan dengan kebolehpercayaan PW2, yang arif hakim bicara sebaliknya terus menggunakan nota keterangan tersebut untuk membuat dapatan bertentangan terhadap perayu. Ini adalah kesalahan serius yang mewajarkan campur tangan mahkamah rayuan. Selain daripada bertujuan untuk mencabar kebolehpercayaan PW2, keterangan kes tersebut adalah tidak relevan dan tidak boleh diterima bagi tujuan perbicaraan semasa.

(3) Dalam membuat dapatan kebersalahan, yang arif hakim bicara telah memberikan penekanan kepada keterangan PW2 berkaitan perasaan takut perayu yang terpancar pada riak mukanya apabila dia membuka pintu kereta perayu. Keterangan yang bersifat sebegini tidak relevan kerana ia amat subjektif dan adalah lebih kepada tanggapan. Kecuali disahkan, ia tidak boleh dikatakan sebagai keterangan fakta. Walau bagaimanapun, dalam kes ini, PW2 tidak memberikan apa-apa keterangan terperinci untuk mengesahkan penyataannya. Maka, yang arif hakim bicara sepatutnya mengarahkan agar keterangan tersebut tidak boleh diterima.

Case(s) referred to:
Parlan Dadeh v. PP [2009] 1 CLJ 717 FC ***(foll)***
PP v. Ng Sing Ting & Anor [2008] 7 CLJ 247 HC ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 165(1)
Dangerous Drugs Act 1952, s. 39B(2)
Evidence Act 1950, s. 146

For the appellant - Hisyam Teh Poh Teik (James George Chelliah with him); M/s Teh Poh Teik & Co
For the respondent - Munahyza Mustafa; DPP

[Appeal from High Court, Johor Bahru; Criminal Trial No: 45-33-2003]

Reported by S Barathi

JUDGMENT

Hishamudin Mohd Yunus JCA:

The Charge Against The Appellant

[1] The appellant was tried before the Johor Bahru High Court for trafficking in 785 grams of monoacetylmorphines, an offence punishable under s. 39B(2) of the Dangerous Drugs Act 1952 ('the Act'). The offence was said to have been committed at about 11.42am on 28 June 2002 at the exit lane to the Condominium Larkin Utama, Susur 5, Jalan Tun Abdul Razak, Johor Bahru.

The Decision Of The High Court

[2] The appellant was convicted of the charge and sentenced accordingly (the mandatory death sentence). He now appeals to this court.

Decision Of This Court

[3] We heard this appeal on 26 July 2012. Having heard submissions and examined the appeal record, we have allowed the appeal. The conviction and sentence was set aside.

Our Grounds

We now give our grounds.

(a) The prosecution's case

The main witness is a police officer, ASP Leong Ah Kow (PW2). Acting on information received, he led a police team to the scene of the alleged offence. He divided the police team into three groups. There, at the scene, they took up ambush positions. They communicated with one another using walkie-talkies. At about 11.40am, a member of the ambush team, one Insp. Khalid Mat, reported that the targets had left in two cars, a Perodua Kelisa and a Proton Wira. PW2 gave instructions to another member of the team, one Insp. Bashar bin Satar (PW7) to block the cars from exiting. PW7, who had taken up position with his men in his car, asked his driver, Det Ahmad Daud, to block the exit. The two cars were successfully blocked. PW2's team then came from behind and stopped behind the Proton Wira car.

PW2 said he and his men rushed to the Proton Wira car. Its registration number was JET 9981. There was only the driver (subsequently identified as the appellant) in the car. PW2 identified himself and asked the appellant to come out of the car.

PW2 conducted a search in respect of the Proton Wira car. At the foot well of the front passenger seat he found a canvas bag with the brand name 'Power Pac'. The bag had two compartments inside it. In the first compartment there was a black plastic bag. This plastic bag contained ten newspaper packages. In each of the packages PW2 found a transparent plastic wrapper containing a substance that he suspected to be drugs. In the second compartment PW2 found five newspaper packages. Each package contained a transparent plastic wrapper containing a substance suspected to be drugs. In the glove compartment of the car, PW2 recovered a plastic packet containing a substance suspected to be drugs wrapped in newspapers. The substances found in these 16 packages are the subject matter of the charge.

The prosecution third witness, one Tong Gian Kiang (PW3), gave evidence that he rented out the Proton Wira car to the appellant. He said the appellant came to rent the car with a woman by the name of Chong Mei Fong.

(b) The appellant's case

It is the appellant's defence that although he rented the Proton Wira car, in actual fact it was for the use of Chong Mei Fong, who wanted to go back to her hometown in Bahau. The appellant said in evidence that, between the period that he rented the car (on 22 June) until the date of his arrest six days later (on 28 June), he had driven the car only on two occasions, that is, on 22 June and on 28 June. The appellant asserted that he did not have exclusive use of the Proton Wira car since Chong Mei Fong also had used the same. It is the defence contention that Chong Mei Fong could have concealed the drugs in the canvas bag and then put the bag in the car. It is further contended by the appellant that there was also a possibility that Chong Mei Fong could have put the drugs in the glove compartment without his knowledge.

(c) The appellant's first submission

Before us, learned counsel for the appellant, Encik Hisyam Teh Poh Teik, firstly, submitted that the learned trial judge erred in law when she accepted the evidence of PW2 at face value. In this regard, Encik Hisyam, in his submission, brought to our attention to another Johor Bahru High Court criminal case, namely, Criminal Trial No: 45-74-2003, which also involved the same appellant, Chia Meng Leng. In this other trial, the appellant was charged in the Johor Bahru High Court before Mohd Zawawi Salleh JC (as he then was) for drug trafficking together with another person, one Ng Sing Ting. (The case is reported in *PP v. Ng Sing Ting & Anor* [2008] 7 CLJ 247.) The facts of this other case are closely inter-related to the facts of the case before us. This is because the incident happened on the same day (28 June 2002) around the same time (11.40am) at the same condominium (Condominium Larkin Utama), involving the same ambushed team (led by the same ASP Leong Ah Kow (PW2); and involving the same two cars that we have earlier mentioned - a Proton Wira and a Perodua Kelisa car. At the hearing of the appeal before us, neither Encik Hisyam nor the learned DPP, Pn Munahyza Mustafa, was able to satisfactorily explain to us as to why the two cases were tried separately instead of together. In this other case, the appellant and Ng Sing Ting were acquitted at the conclusion of the case for the prosecution. In the case of the appellant that is now before

A us, during the trial at the High Court, the defence had tendered as evidence (marked as exh. D36) the notes of the proceeding of the High Court in the other case. The purpose of the defence tendering exh. D36 was to show that PW2 was not credible as his evidence in that other case had been
B successfully impeached, and that the learned trial judge in the other case (Mohd Zawawi Salleh JC) had found ASP Leong (PW2) (who was called as a key prosecution witness (as PW4)) to be not a credible witness. This finding on ASP Leong's credibility in the other case was one of the main
C reasons that led to the court in that case to rule that the prosecution had failed to make out a *prima facie* case.

As we have said earlier, exh. D36 was brought to the attention of the learned trial judge in the instant case. The
D notes of proceedings of that other case (ie, exh. D36) show that PW2 had been impeached in the course of the trial of that other case; and that the charge in that other case arose out of the same set of facts as in our case. In fact, ideally, as a matter of procedure, the two cases should have been tried
E together, and not tried separately by two different judges (see s. 165(1) of the Criminal Procedure Code). In our judgment, in view of the successful impeachment of the testimony of ASP Leong (PW2) in the other case, and the finding of the learned trail judge there that PW2 was not a credible witness, these
F findings have seriously undermined PW2's credibility in the instant case; particularly, as the two cases are very closely related by reason of the facts that we have shown above; and that, strictly, these two cases, as we have just said, ought to have been tried together, and not separately. In the present
G case, we observe that it is obvious from the grounds of judgment that the learned trial judge had failed to give due weight to the PW2's impeachment in the other trial. In fact, the learned trial judge never weighed exh. D36 at all. On this ground alone we find the conviction unsafe and ought to be
H set aside.

(d) The appellant's second submission

However, there is another reason why we should set aside the conviction. In the present case, Encik Hisyam brought to our
I attention that what the learned trial judge did, to the prejudice of the appellant, was to make findings adverse to the

appellant from certain portions of the notes of proceedings of the other trial. For, the learned trial judge, in her grounds of judgment, said: A

> Dalam kes MT3, Ekshibit D36 menunjukkan bahawa kereta JGN 9430 di mana dadah dijumpai adalah milik tertuduh (Chia Meng Leng). B

And, further, down the same page of her grounds, the learned trial judge said:

> Melalui keterangan ekshibit D36, dadah yang dijumpai dalam kereta JGN 9430 adalah sama dengan jenis dan sifat dadah dijumpai dalam kereta Wira JET 9981 yang dipandu oleh tertuduh pada masa beliau ditangkap. C

With respect, we accept learned counsel's contention that it was wrong in law to import this prejudicial evidence from the notes of evidence of the other trial to make a finding in the present case that is detrimental to the appellant. Exhibit D36 was tendered by the defence in support of the defence case (and solely to show the impeachment proceeding, and to challenge the credibility of PW2 - see s. 146 of the Evidence Act 1950). Yet, here we have a paradoxical situation where the learned trial judge, instead of accepting Exh. D36 as supporting the defence case regarding the credibility of PW2, because of the impeachment proceeding in the previous trial, proceeded to make use of the notes of evidence to make adverse findings against the appellant. This is a serious error that warrants appellate intervention. Other than for the purpose of challenging the credibility of PW2, the evidence of the other trial is irrelevant and inadmissible for the purpose of the present trial. D E F G

(e) The appellant's third submission

In the present case, in making a finding of guilt, the learned Judicial Commissioner had given weight to the evidence of PW2 who said that there was a very frightful expression on the face of the appellant at the time when he (PW2) opened the door of the appellant's car. The learned Judicial Commissioner ruled that this piece of evidence was relevant citing s. 8 of the Evidence Act 1950 and the Federal Court case of *Parlan Dadeh v. PP* [2009] 1 CLJ 717. With respect, we agree with Encik Hisyam's argument that this approach H I

taken by the learned Judicial Commissioner is erroneous in law. In our view, evidence of this nature is irrelevant as it is so subjective, and more a matter of perception. Unless substantiated, it cannot be said to be an evidence of a fact. A trial court must always be cautious when dealing with such evidence. How a trial court ought to treat such evidence of perception as this is clearly laid down in *Parlan Dadeh* where the Federal Court said (at p. 747):

> Conduct like the flight of an accused is a more positive act and is easily established. On the other hand conduct like the accused looking stunned, nervous, scared or frightened is very often a matter of perception and more detailed evidence may be required.

In the instant case, PW2 did not provide any detailed evidence to substantiate his assertion. Hence, the learned Judicial Commissioner should have ruled the evidence inadmissible.